APR 1 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER, 1954 TERM

No. 693

SOPHIE D. COHEN and MEYER KRAUSHAAR, Executors of the Estate of William W. Cohen, Deceased,

Petitioners,

against

BESSIE G. GLASS, Executrix of the Estate of Joseph Glass, Deceased, JOSEPH P. TUMULTY, JR., Executor of the Estate of Joseph P. Tumulty, Deceased, and MIDDLE STATES PETROLEUM CORPORATION,

Respondents.

PETITION OF SOPHIE D. COHEN AND MEYER KRAUSHAAR, AS EXECUTORS OF THE ESTATE OF WILLIAM W. COHEN, DECEASED, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEYER KRAUSHAAR,
Attorney for Petitioners,
42 Broadway,
New York 4, N. Y.

BLEED THROUGH POOR COPY

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement of Case	4
Reasons for Allowing the Writ	13
Conclusion	17
Appendix	2017

TABLE OF CASES CITED

Binder, Re, 137 Ohio St. 26, 129 A. L. R. 130	14
Bond & Mortgage Guarantee Co., In re, 303 N. Y. 423	14, 15
Case v. Los Angeles Lumber Co., 308 U. S. 106	14
Consolidated Rock Products Co. v. DuBois, 312 U. S. 510	14
Cowee v. Cornell, 75 N. Y. 91	14
Crites v. Prudential Ins. Co., 322 U. S. 408	13
Detroit Trust Company v. Mason, 309 Mich. 281, 306	14
Dodds v. McColgan, 229 App. Div. 273	15
Emerich v. City Bank Farmers Trust Co., 300 N. Y. 417	15
Finnegan v. McGuffog, 203 N. Y. 342	15
First National Bank v. Basham, 238 Ala. 500, 125 A. L. R. 656	14
First National Bank of Cincinnati v. Flersheim, 290 U. S. 504	14

PAGE

Glover v. National Bank of Commerce, 156 App. Div. 247 15

Gutterson & Gould v. Lebanon Iron & Steel Co., 151 Fed. 72 14

Harkin v. Brundage, 276 U. S. 36 13

Holmberg v. Armbrecht, 327 U. S. 392 15

Hubbell's Will, In re, 302 N. Y. 246 14

Jackson v. Smith, 254 U. S. 586 13

Lightfoot v. Davis, 198 N. Y. 261 15

Litton v. Pepper, 308 U. S. 295, 306-7 14

Magruder v. Drury, 235 U. S. 106 13

Martin v. Luster, 85 Fed. (2) 833 (7th Cir.), cert. den. 300 U. S. 667 14

Marvin v. Brooks, 94 N. Y. 71 14

Meinhard v. Salmon, 249 N. Y. 458 15

Merriam v. Wimpfheimer, 25 F. Supp. 405, 408 16

Michigan v. Michigan Trust Co., 286 U. S. 334 13

Michoud v. Girod, 4 How. (U. S.) 502 14

Mosser v. Darrow, 341 U. S. 267 13

Nasaba Corporation v. Harfred Realty Corporation, 287 N. Y. 290 15

National Surety Co. v. Coriell, 289 U. S. 426 14

Northern Finance Corp. v. Byrnes, 5 F. 2d 11, 12-13 (C. A. 8) 14

Northern Pacific R. Co. v. Boyd, 228 U. S. 482 8

Sage v. Culver, 147 N. Y. 241 14

Sedgwick's Will, In re, 74 Ohio App. 444, 59 N. E. 2d 616, 624 14

Shapiro v. Wilgus, 287 U. S. 348 13

FILED THROUGH POOR COPY

PAGE

Spallholz v. Sheldon, 216 N. Y. 205 15

Sprague v. Ticonic National Bank, 307 U. S. 161 13

Taylor v. Standard Gas & Electric Co., 306 U. S. 307 14

Vernon Metal & Produce Co. v. Joseph Joseph & Brother, 241 N. Y. 544 14

Weber v. Empire Holding Corp., 149 Ore. 503, 41 P. 2d 1086 14

Weil v. Neary, 278 U. S. 160 13

Wendt v. Fisher, 243 N. Y. 439 15

Woods v. City Natl. Bank & Trust Co., 312 U. S. 262 13

STATUTES CITED

Civil Practice Act of the State of New York, Article 2:

Section 24 2

Section 48, Subdiv. 5 ..... 2, 15

Section 53 2

Title 28 U. S. C. Section 1254(1) 2

AUTHORITIES CITED

Drinker, Legal Ethics (1953) 74, 103-106, 109 10

Glenn on Fraudulent Conveyances, Rev. Ed., Vol. I, Sections 222, 224, 225, pp. 386, 388, 389-393 14-15

Restatement of Trust, Section 170 14

Tardy's Smith on Receivers, 2 Ed. (1920), Section 610, p. 1709, Section 613, p. 1714 14

54 Am. Jur. Section 320, pp. 254-5 14

BLEED THROUGH POOR COPY

Supreme Court of the United States

OCTOBER, 1954 TERM

No. .....

SOPHIE D. COHEN and MEYER KRAUSHAAR, Executors of the Estate of William W. Cohen, Deceased,

Petitioners,

against

BESSIE G. GLASS, Executrix of the Estate of Joseph Glass, Deceased, JOSEPH P. TUMULTY, JR., Executor of the Estate of Joseph P. Tumulty, Deceased, and MIDDLE STATES PETROLEUM CORPORATION,

Respondents.

PETITION OF SOPHIE D. COHEN AND MEYER KRAUSHAAR, AS EXECUTORS OF THE ESTATE OF WILLIAM W. COHEN, DECEASED, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit entered January 11, 1955, affirming by a divided court the judgment of the District Court for the Southern District of New York entered May 21, 1954, amending a judgment entered January 4, 1952, insofar as the said judgments, both original and as modified, deny all motions for surcharge on the final report and final accounting of Joseph P. Tumulty and Joseph Glass, as Receivers of United Oil Producers Corporation, and deny a recovery against Middle States Petroleum Corporation in favor of the estate of United Oil Producers Corporation

or any of those claiming through said estate, and which said judgments discharge both said Joseph P. Tumulty and Joseph Glass as Receivers of United Oil Producers Corporation, and insofar as said judgments dismiss the general charges of fraud and conspiracy and dismiss petitioners' specific claims of fraud and conspiracy. (Typewritten Supplemental Record and pp. 9a-13a.)

The title of the cause in which said judgments were entered is set forth in the opinion of the Court of Appeals, found in the appendix (p. 2017).

Motion for rehearing was denied February 21, 1955. (See appendix, p. 2131). Decision on appellate costs March 25, 1955, see appendix, p. 2132.

Opinions Below

The District Court's opinion is reported at 124 F. Supp. 728. It may be found in the appendix to the objectants-appellants' brief, Vol. 1, pp. 14a-178a.

The opinions in the Court of Appeals for the Second Circuit are reported in 154 F. 2d 978; 156 F. 2d 697; 203 F. 2d 836; 210 F. 2d 360; and the final opinion rendered January 11, 1955, is as yet unreported, and the opinion on rehearing dated February 21, 1955, as yet is unreported. The decision on appellate costs made March 25, 1955, is as yet unreported.

All the opinions in the Court of Appeals may be found in the appendix.

Jurisdiction

The jurisdiction of this court is invoked under Title 28 U. S. C. § 1254(1).

Statutes Involved

Civil Practice Act of the State of New York, being Article 2, §§ 24, 48 Subdiv. 5, and 53, set forth in the appendix (p. 2207).

BLEED THROUGH POOR COPY

Questions Presented

1. Did the receivers, appointed in a friendly non-adversary creditors suit brought for the conservation of assets of a debtor corporation, its associates and subsidiaries, act with undivided loyalty toward the beneficiaries they represented when they brought about a judicial sale in said suit and judicial confirmation thereof without disclosing to the court and the parties interested that one of them had a personal or selfish interest in the transactions which might or could have been in conflict with the interests of some of the beneficiaries whom they represented?

2. Assuming that such receivers had no such personal interest but nevertheless found that they represented estates of debtor corporations whose interests might or could have come in conflict if such assets were sold at judicial sale, before bringing about such sales were the receivers obliged to apply to the court for instructions after full and complete disclosure on notice to the parties interested?

3. In any case, did the receivers have the burden of proof on their accounting, where the sales were challenged, of establishing that the prices paid by the purchaser for such assets were fair?

4. By sponsoring, underwriting or representing that a plan of reorganization of a "system" holding corporation was fair to all parties concerned, did the receivers render themselves liable to surcharge where the plan of reorganization was discovered, on the receivers' accounting, to be unfair and in violation of the fixed principle that creditors must be paid in full before participation is allowed to stockholders and, as a result, creditors or bondholders having a prior right were not paid in full but were accorded distributive values for less than their ad-

mitted claim as a result of judicial sales brought about by the receivers pursuant to such plan and without notice to persons affected?

5. Is the reorganized company, who accepted the transfer of assets through the challenged judicial sales under the circumstances disclosed by the facts in the record, liable to the extent of the losses sustained by the bondholders?

6. Is the New York statute of limitations applicable to the claims of U. O. P. bondholders against the reorganized company?

7. Was the Court of Appeals warranted in imposing substantial appellate costs on petitioners?

Statement of the Case *

The complexities of this case are thus resolved and concisely stated in the concluding paragraph of the dissenting opinion of Judge Frank: "In more concrete terms, the salient features of the story are as follows: Glass, originally a lawyer representing stockholders of U.O.P., becomes its receiver and is handsomely rewarded for that service.[69] Having a continued, personal interest in the

* 1. The appeal in the Court of Appeals was heard upon the original record and original exhibits and upon appendices to the brief and reply brief of appellants and the joint appendix to the brief of the appellees. These appendices did not contain all the testimony nor did they reproduce all exhibits, but only those or parts of those as the parties deemed necessary to fairly present the issues on appeal were printed. References were made to original exhibits, both at the argument and in the briefs which were not printed either in whole or in part in the appendices. Wherever references will be made to the record and appendices the following symbols will be used. To refer to the pages of the Supplemental and Amended Objections attached to the appellant's appendix, the symbols "S. A. p." will be used. References to appellants' appendices both in the appendix to the main brief and the appendix to the reply brief will be made by page number followed by "a". Where reference is made to the appellees' joint appendix it will be prefaced by "ja".

2. Petitioners' exhibits are referred to herein preceded by the symbol "OB." or "OBJ." Respondents' exhibits will be indicated by "R. Ex." Middle States Oil Corporation will be referred to as M.S.O. Middle States Petroleum Corporation will be referred to as M.S.P. United Oil Producers Corporation will be designated as U.O.P. and Oil Lease Development Company as O.L.D.

"[69] Meanwhile, he still engages in practice as a lawyer."

BLEED THROUGH POOR COPY

welfare of the (M.S.O.) stockholders, because of unpaid fees owing to him from them, he promotes, and helps put through, a reorganization. This reorganization favors the (M.S.O.) stockholders and injures the holders of undeposited U.O.P. bonds. It involves the creation of a new company (M.S.P.) in which U.O.P.'s valuable assets are not only merged but submerged, a company for which, before the judicial sales—essential to that reorganization—he had been virtually assured he would be counsel. As a consequence of that reorganization, he receives fees (as counsel for the stockholders' committee) which could not otherwise have been paid. Before confirmation of the judicial sales, he does not disclose his personal interests to the judge. A few weeks after confirmation of the sales, he becomes president of the new company at a splendid salary.[70] As president, and still U.O.P. receiver, he soon favors the new company where its interests conflict with those of the holders of undeposited U.O.P. bonds. Ever after, he remains U.O.P. receiver and president of that company (M.S.P.), and controls it.[71] He and his family buy and now own a highly valuable block of its outstanding securities.[72] All this he achieves by means which caused

---

"[70] Glass' annual salary was initially $50,000. During the depression it was reduced to $24,000 but was subsequently increased and is now about $56,000."

"[71] Judge Smith found that Glass and a group friendly to him have 'control and management' of the new company, and 'that he has greatly profited over the years from his association' with it. He also found, 'The boards of directors of the new corporation have been friendly to Glass' management and have contained several members who, by means of employment by the corporation or by association with Glass in his law firm, have been closely connected with him.' And he found that the voting trust, which 'ran out after ten years,' was renewed, and that Glass, from the beginning, has been a voting trustee. The voting trust no longer exists."

"[72] Judge Smith found that Glass and his family own 8% of the voting trust certificates for Class A stock, the sole class of securities now outstanding since the bonds of the new company were retired on January 1, 1945.

Large dividends have been paid on that stock, which is now worth several millions of dollars."

a serious loss to bondholders for whom he was obligated to act as a fiduciary. I think a federal receiver may not thus misuse his position."

The cause or controversy arises out of a "friendly" creditors bill filed more than thirty years ago, to wit August 15, 1924, in the United States District Court for the Southern District of New York, in which the court's jurisdiction was invoked because of diversity of citizenship (Ex. OB.CC, S.A. pp. 122-128). The debtor corporation, MSO, was a "system holding company." The original bill contained no charge that the company was insolvent, but rested solely upon the claim that it was financially embarrassed and that receivers were necessary to straighten out its affairs for the protection of creditors and stockholders and to avoid irreparable injury to them. The debtor, MSO, appeared simultaneously with the filing of the bill, admitted the allegations thereof and consented to the appointment of receivers (pp. 1a-2a).

Shortly antedating the filing of the bill, on June 15, 1924, a stockholders bill had been filed (Ex. OB.N, S.A. pp. 70-90) and a motion for the appointment of a temporary receiver denied primarily on the ground that the company was not insolvent (pp. ja 2153-2157). That bill was filed by a law firm representing a committee of stockholders of the debtor corporation (Ex. OB.Y, Ex. OB. AA, S.A. pp. 116-119), and one of whose members (Glass) became, in turn, attorney for the receivers (R. Ex. 5) and upon the death of one of the original receivers, substitute receiver (p. 4a, fol. 11; p. 19a, fol. 55).

Upon the filing of the creditors bill, the same temporary receivers were appointed in both cases and the causes consolidated (Ex. OB.FF, OB.KK, OB.LL, OB.MM) and their appointment was subsequently made permanent on the creditors bill (R. Ex. 7, S.A. pp. 159-167). By means of amended and supplemental complaints drafted by the receivers and their attorneys, and for the purpose of straight-

BLEED THROUGH POOR COPY

ening out the affairs of the associated subsidiaries, these were brought into the suit and the receivership extended (Ex. OB. 257, pp. 2, 3).* Ancillary receivers were appointed for the operating subsidiaries in the states where their properties were located (Ex. OB. 257, p. 3, R. Ex. 285 ja 1983-1984). These were subsequently wound up after the payment of their debts (R. Ex. 285, ja 1983-1984).

Five years after the receivership had been in force, during which valuable oil wells had been brought in by the most important operating subsidiary (R. Ex. 34 ja, pp. 1346-1349; R. Ex. 51, ja pp. 1398-1401) and which had greatly improved the financial position of UOP, a plan of reorganization (R. Ex. 94, ja, p. 1566) for the system was sponsored or underwritten by the receivers, as a result of which judicial sales of all the assets of the system, including those of UOP, were sold to representatives of the reorganization committee and thereafter acquired by the reorganized company, M.S.P. (R. Ex. 103-R. Ex. 139 incl., ja, pp. 1600-1780).

The receivers did not account or seek a discharge until more than fifteen years had elapsed since the confirmation of the judicial sales, and this only after an application by petitioners to compel the receivers to account (p. 5a). Petitioners, UOP bondholders and stockholders of associates and subsidiaries of M.S.P., filed an answer objecting to the discharge of the receivers and asserting a counterclaim against M.S.P. charging fraud in the acquisition of the system company including the assets of UOP, which consisted not only of the collateral to secure the UOP bondholders but unpledged assets of UOP consisting of outstanding receivables from other corporations in the system which were so large that, if collected, they would have been sufficient to discharge the entire indebtedness of U.O.P. including the bonds.

---

* Judge L. Hand's opinion at pp. 2029-2030 is in error in stating that there were 38 suits in which receivers were appointed and that the "Glass" firm represented creditors. There was only one suit and the Glass firm represented only stockholders.

The receivers' discharge was granted without a hearing by the receivership judge (Knox, J.) and upon appeal to the Court of Appeals (opinion by Frank, C.J., 154 F. 2d 978, see appendix, pp. 2153-2202) the order was reversed and an inspection of the books and papers of the receivership allowed. In implementing the mandate the receivership judge refused to appoint a master or to direct that all accountings in all corporations involved in the suit be tried as one. An appeal was again taken to the Court of Appeals, but the order was affirmed on the ground that the court's action was discretionary (156 F. 2d 697, see appendix, pp. 2205-2206).

The receivership court then designated Hon. J. Joseph Smith, District Judge for the District of Connecticut, "to hear and determine and adjudicate this cause to the extent that the same involves a judicial settlement of the final report and accounting of U.O.P. verified January 1, 1945, and the issues raised by the answer of objectants verified April 3, 1945." The objections were thereupon amended and supplemented (124 F. Supp. 728 at p. 735, Finding 78; see also printed objections appended to objectants' appendix).

After a protracted trial Judge Smith found that while the plan of reorganization sponsored or underwritten by the receivers was in fact a violation of the "fixed principle" of *Northern Pacific R. Co.* v. *Boyd*, 228 U. S. 482, that the claims of creditors must be paid in full or otherwise provided for by full participation in the assets of the debtor before its stockholders could participate (124 F. Supp. at p. 781), nevertheless the receivers were not surchargeable thereunder, and he further held that one of the receivers, Glass, was innocent of wrong despite the fact that he had in effect a personal or private interest in bringing about the reorganization and the judicial sale of assets. He dismissed all charges of fraud and conspiracy (124 F. Supp. 779). He held the receivers not surchargeable with respect to the U.O.P. transfers. He granted a discharge to Receiver Joseph P. Tumulty, withholding discharge to

BLEED THROUGH POOR COPY

Glass until all the other accountings involving the other corporations should be adjudicated (124 F. Supp. at p. 776). He found it unnecessary to pass upon the plea of M.S.P. that all claims against it were barred by the New York State statute of limitations and dismissed a counterclaim against petitioners as barred by the New York State statute of limitations (124 F. Supp. at p. 805).

The Court of Appeals, on petitioners' appeal, dismissed so much of the appeal which sought to bring up for review intermediate orders of the District Court and refused to review the case until the judgment against Glass was made final (203 F. 2d 836, see appendix, pp. 2134-2137), calling for a stipulation to that effect. Upon filing the stipulation, the court again refused to review until the judgment below was modified (210 F. 2d 360, see appendix, pp. 2138-2146). At the same time it granted a new trial with respect to M.S.P.'s counterclaim. Upon the judgment being made final, it affirmed by a divided court, Judge Frank dissenting in a long but remarkable and well-documented opinion found in the appendix, pages 2063-2129 * in which he summarizes the major derelictions of one of the receivers, Glass, as follows:

"(1) He urged and helped to consummate a 'system' reorganization, to his own benefit, and did not propose a separate U.O.P. reorganization which would have been far more beneficial to the U.O.P. bondholders.

(2) He had a personal interest in fees, payments of which depended on the sales in aid of the 'system' reorganization, but he did not disclose that interest to the judge until after confirmation of the sales.

(3) He had a personal interest in becoming lawyer for the new company which would result from the 'system' reorganization, but he did not disclose that interest to the judge.

* Original page numbers used by the Court of Appeals in its opinion.

pellants' charges against Glass and should have refrained from directing an investigation for the benefit of whatever persons may have been injured by Glass' alleged misconduct. It is fortunate, however, that appellants have the requisite standing and self-interest in the investigation, since it might well be difficult for the court otherwise to obtain the needed services of a lawyer and an expert accountant. (For the court merely to appoint a lawyer who would be paid on a contingent basis and who [unlike appellants' lawyer, who may in any event look to the Cohen estate for payment] would go unpaid if unsuccessful, would be insufficient; the services of an expert accountant are also needed. The S.E.C. is not authorized by statute to engage in such an undertaking except under the Chandler Act.)"

It was this implied direction to continue with the investigation that prompted petitioners' counsel to amend and supplement the objections and to inquire not only into the receivers' misconduct in connection with the U.O.P. accounting but other claims, which ultimately elicited the facts theretofore undisclosed: that the receivers had made use of receivership funds without court authority and had diverted $1,454,578.82 to the use of M.S.P. (see Findings 159-164, 124 F. Supp. 728, 762) and had fraudulently allocated overhead after reorganization (124 F. Supp. 728, 791-4, 799) and had been guilty of questionable conduct in connection with the assets of one of the companies in the system, to wit, Western States Oil Corporation (124 F. Supp. 728, 800). The latter findings were not reviewed by the Court of Appeals, which confined itself solely to the review of the judicial sales involving U.O.P., but these very sales also involved the assets of O.L.D., Southern States Oil Corporation and M.S.O. O.L.D. owned $389,800 of U.O.P. bonds, which were sold at the same judicial sale through the reorganization committee to M.S.P. for the sum of $225,000, with a resultant loss to the stockholders of O.L.D. of $164,800 with accrued interest (Finding 166, 124 F. Supp. 728, 763), 25.35% of which was lost by Southern States and 42.63%

BLEED THROUGH POOR COPY

by outside stockholders (Finding 87, 124 F. Supp. at p. 737). Thus, it is clear that Judges L. Hand and Swan were in error in believing that [undepositing] U.O.P. bondholders only had a small interest in the outcome and that the proceedings on the receivers' accounting were not one involving public interest.

Reasons for Allowing the Writ

A writ should be granted because "this case relates to the conduct of a receiver appointed by a federal court, and thus affects the integrity of the federal judicial process * * * " (Dis. op., Frank, J., p. 2064). A receivership brought about at the instance of a simple creditor in a "friendly" creditors suit is watched with "jealous eyes". *Shapiro* v. *Wilgus*, 287 U. S. 348; *Harkin* v. *Brundage*, 276 U. S. 36; *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334. There is involved an important question of federal judicial administration. *Sprague* v. *Ticonic National Bank*, 307 U. S. 161.

Important questions applicable to the conflict of interest between a federal receiver and the beneficiaries of his trust are involved. *Jackson* v. *Smith*, 254 U. S. 586; *Woods* v. *City Natl. Bank & Trust Co.*, 312 U. S. 262; *Crites* v. *Prudential Ins. Co.*, 322 U. S. 408; *Mosser* v. *Darrow*, 341 U. S. 267.

The majority opinion is or may be in conflict with the decisions of this court in *Magruder* v. *Drury*, 235 U. S. 106; *Jackson* v. *Smith*, 254 U. S. 586; *Woods* v. *City Natl. Bank & Trust Co.*, 312 U. S. 262; *Crites* v. *Prudential Ins. Co.*, 322 U. S. 408; *Mosser* v. *Darrow*, 341 U. S. 267; *Weil* v. *Neary*, 278 U. S. 160. These cases hold that any possible conflict in interest which might influence a fiduciary renders the transaction questionable and throws upon the fiduciary the burden of proof that no damage was caused regardless of good faith and honesty of purpose, and where a conflict arises in the case of the same fiduciary representing conflicting interests as between rival trusts, the fiduciary has

a duty of full disclosure and must apply to the court for instruction on notice to the parties. See also *Michoud* v. *Girod*, 4 How. (U. S.) 502; *Litton* v. *Pepper*, 308 U. S. 295, 306-7; *Martin* v. *Luster*, 85 Fed. (2) 833 (7th Cir.), cert. denied 300 U. S. 667; *Cowee* v. *Cornell*, 75 N. Y. 91; *Sage* v. *Culver*, 147 N. Y. 241, 247; *In re Bond & Mortgage Guarantee Co.*, 303 N. Y. 423.

The majority opinion is or may be also in conflict with the following authorities holding that the burden of proof is upon the fiduciary when his account is challenged: *Gutterson & Gould* v. *Lebanon Iron & Steel Co.*, 151 Fed. 72; Tardy's Smith on Receivers, 2d Ed. (1920), Sec. 610, p. 1709, Sec. 613, p. 1714; *Marvin* v. *Brooks*, 94 N. Y. 71; *Vernon Metal & Produce Co.* v. *Joseph Joseph & Brother*, 241 N. Y. 544; *Weber* v. *Empire Holding Corp.*, 149 Ore. 503, 41 P. 2d 1086.

It is or may be in conflict with the great weight of authority holding that a fiduciary cannot act in the circumstances here disclosed without either resigning from one of the trusts or applying for instructions. *In re Hubbell's Will*, 302 N. Y. 246; 54 Am. Jur. § 320, pp. 254-5, citing *Re Binder*, 137 Ohio St. 26, 129 A. L. R. 130 and *First National Bank* v. *Basham*, 238 Ala. 500, 125 A. L. R. 656; Restatement of Trusts, § 170; *Detroit Trust Company* v. *Mason*, 309 Mich. 281, 306; *In re Sedgwick's Will*, 74 Ohio App. 444, 59 N. E. 2d 616, 624; *Northern Finance Corp.* v. *Byrnes*, 5 F. 2d 11, 12-13 (C. A. 8).

The majority opinion also is or may be in conflict with *National Surety Co.* v. *Coriell*, 289 U. S. 426; *First National Bank of Cincinnati* v. *Flersheim*, 290 U. S. 504; *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307; *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106 and *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, which hold that a plan of reorganization which preserves an interest in the stockholders of a debtor corporation before creditors are fully provided for is invalid. See also Glenn on Fraud-

BLEED THROUGH POOR COPY

ulent Conveyances, Rev. Ed., Vol. 1, §§ 222, 224, 225, pp. 386, 388, 389-393.

The majority opinion tends to "erode" the uncompromising rigidity of the undivided loyalty rule. As was said by Judge Cardozo in *Wendt* v. *Fisher*, 243 N. Y. 439:

> "'It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case' (Munson v. Syracuse, etc., R.R. Co., supra, at p. 74; cf. Dutton v. Willner, 52 N. Y. 312, 319). Only by this uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion."

See also *Meinhard* v. *Salmon*, 249 N. Y. 458; *In re Bond & Mortgage Co.*, 303 N. Y. 423. A federal receiver should not be thus allowed to exculpate himself.

Whether the beneficiaries of the fraud may escape liability on the plea of the statute of limitations presents an important question which should be here reviewed involving, as it does, whether it falls into the purview of federal law rather than state created rights, as in *Holmberg* v. *Armbrecht*, 327 U. S. 392, and in any case, whether the New York statute has been correctly applied since the transfer to the reorganized company was accompanied by concealment of the facts amounting to actual fraud tolling the statute until discovery (N. Y. C. P. A. § 48(5) appendix, p. 2207). *Emmerich* v. *City Bank Farmers Trust Co.*, 300 N. Y. 417; *Finnegan* v. *McGuffog*, 203 N. Y. 342; *Spallholz* v. *Sheldon*, 216 N. Y. 205; *Nasaba Corp.* v. *Harfred Realty Corp.*, 287 N. Y. 290; *Lightfoot* v. *Davis*, 198 N. Y. 261; *Dodds* v. *McColgan*, 229 App. Div. 273; *Glover* v. *National Bank of Commerce*, 156 App. Div. 247.

The decision sought to be reviewed holding, that the judicial sales affecting the pledged and unpledged assets of U.O.P. are valid, will also affect the judicial sales of O.L.D.,

Southern States Oil Corporation and the assets of M.S.O. If held valid, the stockholders of all 39 corporations involved, large in number and scattered all over the United States, are affected.

The decision of the Court of Appeals involving appellate costs presents also a question which ought to be considered by this court, involving as it does the federal judicial process. That decision, if allowed to stand, is enough to discourage any persons from investigating the abuse of a federal receivership process and attempting to bring to light wrongs perpetrated which might otherwise never see the light of day. Cf. *Merriam* v. *Wimpfheimer,* 25 F. Supp. 405, 408. It would mean that a litigant who comes to the aid of the courts, at the court's very suggestion, must not only pay his own expenses but those of the opposition as well. The usual practice in equity, where there is a fund involved under the court's administration, is to impose the expenses upon the fund, particularly where the investigation is not unjustified. While the receivers here claim there is no such fund, yet M.S.P. has been the beneficiary, as the district court found (124 F. Supp. at p. 762), of large sums paid over by the general receivership estate in the guise of loans. The entire receivership was thus made dry by the act of the Receiver Glass himself.

In sum, therefore, there are special and important reasons for the granting of a writ of certiorari because not only is there involved the integrity of the federal judicial process and the administration of justice in federal equity causes, but because the Court of Appeals has decided an important question of federal law which has not been, but should be settled by this court, and has decided a federal question in a way in conflict with the applicable decisions of this court, and has also decided an important question involving the New York State statute of limitations in a way in conflict with the applicable New York State decisions.

BLEED THROUGH POOR COPY

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

MEYER KRAUSHAAR,
Attorney for Petitioners,
42 Broadway,
New York 4, N. Y.

BLEED THROUGH POOR COPY